United States Court of Appeals
for the Second Circuit

APPELLANT BRIEF
REHEARING

77 - 1034

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

PASQUALE PICCIRILLO,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF FOR A REHEARING AND REHEARING EN BANC

Docket No. 77-1034, 77-1040

UNITED STATES COURT OF APPEALS
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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APPELLANT'S BRIEF FOR A REHEARING AND REHEARING EN BANC

On June 8, 1977 this Court affirmed the judgment of conviction entered against the appellant in the United States District Court for the Eastern District of New York rendering an oral opinion.

The question reviewed by the Court of Appeals revolves about the law of entrapment. The key issue is whether the conviction of the defendant should stand in spite of the fact that a material witness against the defendant, the confidential informer, initiated, solicited, induced and participated in the sale of firearms, and was not produced by the government at the trial. Furthermore, no evidence to establish the predisposition of the defendant was adduced by the government. Motions for the production of this material witness and for judgment of acquittal on this basis were repeatedly made and were denied by the trial court.

On several occasions during the trial the court even denied a basic request to charge the jury that the government's failure to produce the confidential informer under its control would permit the jury to draw the inference that such informant's testimony would have been adverse to the government and in favor of defendant.

The defendant contends and maintains that he was denied the right to establish a classical defense of entrapment especially when the trial record shows that the informant actually made the original contact with the defendant, introduced the agent of the government, instructed the defendant to pick up the contraband at a particular location which he supplied. All of this coupled with the fact that the defendant established with a preponderance of the evidence the defense of entrapment - He was solicited - and the government failed to adduce any evidence of his predisposition.

The trial record is totally bereft of any direct or credible evidence of such predisposition. In fact, it was pointed out in the papers on appeal and upon oral argument to this court, and again it is reiterated here, that the government's brief relied on the cross-examination by defendant of a government special agent who stated that he had no personal knowledge of defendant's predisposition, but had relied on his informant.

Appellant has never been arrested or convicted of any crime. He is an immigrant who succumbed to the wiles of an informer who wanted to get revenge on his family, and this fact was in part adduced upon the trial. The further development of this issue was stunted by the absence of the confidential informer who, as indicated throughout the record, was made unavailable and inaccessible to the defendant throughout the trial.

That his absence was contrived by the government thereby precluding defendant's attorney from serving a subpoena upon the said informer is evidenced by the testimony of the government's witness, Special Agent Pitta, who stated that 10 days prior to the trial the confidential informer was called into the government office, paid a

fee of $200.00, and told that defense counsel would seek to subpoena him to testify for the defense. The inference certainly can be drawn that the informer was in fact directed not to make himself available; especially when the record (T. 305) shows that the government did not want him as a witness. The prosecutor avers: "I can tell you that he's not going to be called as a witness". The significance of this inference is that the payment of the $200.00 to the informer was a contingent fee payable for the production of evidence against the defendant and making himself unavailable to the defense as a witness at the trial. It is submitted that the interest of justice required his production by the government as a witness at the trial.

The major thrust of the Court's argument is misplaced in its interpretation of the Hampton case (Hampton v. United States, 425 U.S. 484, 96 S. Ct. 1646) and the Neal case (United States v. Neal, 536 F.2d 533). The facts are distinguishable.

Here unlike Neal, the contingent fee issue was raised during the trial and a motion for judgment of acquittal was made on this issue (Page 31 of Trial Transcript dated November 16, 1976) citing Williamson v. United States, 311 F.2d 341 (5th Circuit 1962). As in the Williamson case the government agents offered "a specific sum of money to convict a specified suspect" (P. 445). In this case the sum of $200.00 was paid to the informer ten days prior to trial without serving him with a subpoena compelling his appearance in the case. This action by the government was fatal and should not have been overlooked by this Court.

The defendant also submits that the recently decided Hampton case and all the cases following its rationale are readily distinguishable from the instant one. The Hampton case involved direct and uncontradicted solicitation of government agents by the defendant, and the question there was whether participation by the government in the promotion of the crime was fatal to the prosecution.

This certainly is not the situation here. In this situation where the confidential informer is actually producing and is actually controlling the situation by providing the contraband, and the Government is actually allowing the defendant to be trapped, to be used as an intermediary. Thus, we have, in effect, the Government selling to the Government, and the defendant has testified that there is an entrapment, and at this point the burden shifts to the Government who must produce the informer.

I cite the analogous cases of United States v. Bueno, 447 F.2d 903, United States v. Oquendo, 490 F.2d 161 and United States v. Gomez-Rojas, 507 F.2d 1213, as well as Hampton v. United States (supra)

Furthermore, the Government's admission that it paid its informer brings it within Williamson v. United States, 311 F.2d 441, where the Government makes a contingent arrangement for paying an informant an amount of money upon the completion of an informant's assignment on the contingency that it results in the arrest of the defendant, a defense of entrapment is established as a matter of law.

CONCLUSION

For the foregoing reasons the judgment of conviction against appellant should be reversed and the indictment dismissed.

June 20, 1977

Respectfully submitted,

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Paula